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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 125

LURIA BROTHERS AND COMPANY, INC.,
Petitioner

v.

FEDERAL TRADE COMMISSION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Luria Brothers and Company, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on January 24, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 389 F. 2d 847 and is printed in the appendix to this petition (App. 1a-33a). The opinions of the Federal Trade Commission are reported at 62 F. T. C. 597 and 649, and are printed in the appendix (App. 34a-127a). The initial decision of the hearing examiner is reported at 62 F. T. C. 262 and is found at pages 2161a to 2668a in the record in the Court of Appeals, a copy of which has been filed with the Clerk of this Court.

JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1968. A timely petition for rehearing was filed on February 6, 1968 and was denied on February 27, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

Is it unlawful for an independent supplier to sell to several buyers—large or small—all, or a large percentage of their respective requirements of a readily available commodity, even through there is no agreement or conspiracy among the buyers to buy from the supplier, nor any agreement or conspiracy between the supplier and *any* buyer, to continue buying, nor any obligation or economic compulsion on any buyer to do so?

STATUTE INVOLVED

The statute involved is Section 5(a)(1) of the Federal Trade Commission Act, 52 Stat. 111 (1938), as amended, 15 U. S. C. § 45(a)(1) (1964), which provides:

> "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

STATEMENT OF THE CASE

Petitioner Luria Brothers and Company, Inc. ("Luria") is a broker, buying and selling iron and steel scrap. The petitioners in a related petition for certiorari growing out of the same proceeding consist of steel mills and foundries who purchased scrap from Luria in varying amounts. For the sake of convenience, the non-Luria petitioners will be referred to as the "mills."

This case began more than 14 years ago when on January 19, 1954, respondent Federal Trade Commission issued a complaint against Luria and the mills. The complaint, as amended, charged that *Luria and the mills* conspired *jointly* to supress competition and create a monopoly in Luria in the purchase and sale of scrap.

It was further charged that in pursuance of such conspiracy, Luria and the mills *"in concert and in cooperation"* (emphasis supplied) performed certain allegedly illegal acts, including engaging Luria as an exclusive or substantially exclusive scrap broker for the mills (R. 26a-27a). This conduct, the Commission charged, violated Section 5 of the Federal Trade Commission Act, 15 U. S. C. § 45(a)(1) (R. 37a).*

Additionally, Luria alone, and in conjunction with the mills was charged with engaging in an enumerated list of unfair acts and practices for the purpose of restraining competition and creating in Luria a monopoly in the purchase and sale of scrap (R. 27a *et seq.*).**

Hearings in support of the complaint commenced January 12, 1955 (R. 4a) and continued intermittently throughout the United States until November 1, 1957 (R. 5a; R. 1979a). At the conclusion of the evidence in support of the complaint, the examiner granted motions by all petitioners to dismiss the complaint insofar as it charged a conspiracy among the mills alone and together with Luria (R. 1980a).

During March, April and May of 1958, petitioners offered evidence in support of their defense (R. 5a-6a).

On March 29, 1961, the examiner issued his initial decision (R. 2161a-2668a). With respect to the issues involved in this petition, he found that the continued purchases

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*"R." refers to the seven-volume joint appendix in the Court of Appeals which is part of the record, one copy of which has been filed with the Clerk of this Court.

**The complaint contained numerous other charges which are not the subject of this petition for certiorari and will not be discussed herein.

by each mill in greater or lesser quantities from Luria was equivalent to an "agreement" by each mill to do so, and he issued an order, *inter alia,* indefinitely prohibiting dealing pursuant to agreement between each mill and Luria on an "exclusive or substantially exclusive" basis, and for a period of *five years* prohibiting each mill from buying more than 50 per cent of its requirements from Luria (R. 2664a-2667a).

The examiner dismissed each charge of unfair practices.*

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*The charges and the record citations to their dismissals are as follows:

1. Pressure on railroads and other sources of supply to sell scrap to Luria. Dismissed, R. 2391a; 2392a; 2397a; 2398a.

2. Sales of new steel by the mills with the understanding that the resulting scrap would be sold by fabricators to Luria. Dismissed, R. 2399a.

3. Sales of new steel by the mills to Luria on condition that Luria sell scrap to the mills. Dismissed, R. 2405a.

4. Sales by Luria of new steel conditioned on sale of scrap to Luria by purchasers of new steel. Dismissed, R. 2409a, 2491a, 2425a-2426a.

5. Purchases by Luria of certain (less desirable) grades of scrap conditioned on sale to Luria of other (more desirable) grades. Dismissed, R. 2428a.

6. Purchases of scrap by Luria at inflated prices to prevent competitors from buying such scrap. Dismissed, R. 2460a.

7. Purchases by Luria of scrap yards for purpose of harassing existing dealers who did not sell scrap to Luria to extent desired by Luria. Dismissed, R. 2469a.

8. Pirating by Luria of employees of competitors. Dismissed, R. 2478a.

9. Making of loans and advances by Luria to scrap dealers to induce the dealers to sell their scrap exclusively to Luria. Dismissed, R. 2508a.

10. Acquisitions by Luria for the purpose of injuring competition or creating a monopoly. Dismissed, see R. 2735a-2736a. (There were also six charges of acquisitions in violation of § 7 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 18. The examiner dismissed four (R. 2508a-2538a). The Commission affirmed the dismissals and dismissed the fifth charge, thus reversing the examiner (R. 2734-2745a). The only § 7 violation which was affirmed related to the acquisition of Southwest Steel Corp. The Court of Appeals affirmed the Commission on this point and petitioner is not seeking review of that decision in this Court.)

Both petitioners and counsel supporting the complaint appealed to the Federal Trade Commission. On November 15, 1962, the Commission handed down its decision. By a vote of 2-1, the Commission agreed with the examiner that Luria's dealings with its customers violated Section 5 of the Federal Trade Commission Act (App. 40a *et seq.*); although Commissioners Anderson and Dixon, who constituted the majority, did not accept the examiner's reasoning. Their final order (App. 116a-121a) differed in important respects from the examiner's.

Commissioner Elman filed a dissenting opinion (App. 107a-115a).

There was no dissent by any commissioner on the dismissal of the unfair practice charges.

Luria and the mills filed exceptions to the proposed final order of the Commission, and on February 13, 1963, the Commission entered its final order (App. 116a-121).

On April 11, 1963, Luria petitioned the Court of Appeals for the Third Circuit to review the Federal Trade Commission order (App. 3a). On January 21, 1966, the matter was argued before Judges McLaughlin, Kalodner and Ganey.

On January 8, 1968, the Court of Appeals in an opinion by Judge McLaughlin, affirmed in its entirety the order of the Commission. On January 24, 1968, the Court entered its judgment. On February 6, 1968, petitioners filed a timely Petition for Rehearing en banc which was denied on February 27, 1968.

Petitioner Luria Brothers and Company, Inc. seeks a writ of certiorari in this Court to review the judgment of the Court of Appeals.

Final Order

In its final form, the Order of the Commission (App. 116a-121a) provided that:

1. Luria cease and desist from (a) contracting or agreeing to act or knowingly acting as exclusive or substantially exclusive broker or supplier of purchased scrap for *any plant of any petitioning mill, or of any other buyer of iron and steel scrap not a party to the proceeding,* and (b) knowingly inducing or receiving preferential status or favored treatment of any kind as broker or supplier of purchased scrap for any petitioning mill or any other buyer of iron and steel scrap.

2. Each of the mills cease and desist from (a) purchasing or contracting or agreeing to purchase, *all or substantially all* its annual requirements of purchased scrap of any plant or plants from or through Luria and from giving preferential status or favored treatment of any nature to Luria, and (b) for five years, from buying more than 50 per cent of the annual requirements of purchased scrap of any of its plants from Luria, except to the extent that adequate scrap was not available from other suppliers on substantially similar and competitive terms with those offered by Luria.

3. (Applies only to export trade.)

4. (For five years prohibits acquisitions by Luria of interests in any business buying or selling scrap as a broker or dealer, without approval of the Commission.)

5. (Orders divestiture by Luria of its interest in Southwest Steel Corporation.)

Although we disagree with the portions of the order dealing with the export trade of Luria and with Luria's divestiture of Southwest Steel Corporation, we recognize that these matters do not have the *general* importance required for a review by this Court on certiorari.

We, therefore, in this petition shall limit ourselves to asking review of the broad and extremely important ques-

tions of law deriving from the first and second paragraphs of the order as described hereinabove.*

These paragraphs in effect unconditionally *forever* prohibit Luria from selling to *any customer anywhere in the world* "all or substantially all" of that customer's requirements of scrap; forever prohibit *every petitioning mill* from buying from Luria for any of its plants "all or substantially all" its scrap; and for *five years* prohibit *every petitioning mill* from buying from Luria *more than 50 per cent* of its scrap requirements at any plant except in emergency situations.

A brief statement of the facts necessary to be known for the consideration of this review follows:

The Luria business began in the most humble possible way about 1889 at Reading, Pennsylvania, and gradually spread through the opening of branch offices across the United States, until, sixty years after it was founded, its activities covered the country.

As the sphere of its activities extended, Luria began selling to many customers including, of course, the mills which are petitioners in this Court. Obviously, as Luria sold to more customers and as the business of the customers increased, the volume of Luria's business increased. More-

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*If this petition is granted, petitioner Luria will argue, with the Court's permission, two further points: First, the evidence covers the period 1945 to 1954, and after thirteen years the record is too stale to support a prospective order. See *American Committee* v. *Subversive Activities Control Board,* 380 U. S. 503 (1965). Already in 1962, Commissioner Elman, dissenting, said that the record was obsolete (App. 114a) See p. 10, *infra.* A similar thought was expressed by this Court in referring to a bankruptcy plan not nearly so old as the record in the case at bar. *Protective Committee* v. *Anderson,* 88 S. Ct. 1157, 1178 (1968).

Second, the order is punitive in containing an unprecedented provision prohibiting each mill from buying more than 50 per cent of its requirements from Luria for five years. It is also vague in prohibiting "substantially exclusive" dealings without defining what percentage of purchases or sales will constitute a violation of the order.

over, as Commissioner Elman noted (App. 107a), the Korean War (June, 1950 to July, 1953) created an extraordinary demand for scrap and vastly extended the business of Luria and other scrap brokers. The complaint in this case was filed shortly thereafter in January, 1954.

During the period covered by the evidence, 1945 to 1954, ferrous scrap provided about 50 per cent of the content of finished steel, and of that 50 per cent, about half represented scrap which steel mills bought. The other 25 per cent was waste scrap, thrown off by steel mills in the course of manufacturing their products. It is the 25 per cent of purchased scrap which is involved in the present case, and it is the legality of the dealings between Luria and the individual mills in Luria's sales of this scrap to the mills which is the issue of this case.

Over a period of many years, the petitioning mills bought from Luria widely varying percentages of their very different requirements of purchased scrap at their various plants.

Although it was *all* "purchased scrap" on which the Commission based its order defining the percentage of scrap which the mills were permitted to buy from Luria (App. 118a), the Court of Appeals in determining Luria's share of the market illogically considered *only* that part of the *total purchased scrap* which was sold to the *mills through brokers and dealers,* ignoring that part sold by others (App. 9a-10a). Since all sellers of scrap compete with each other, there is no basis upon which to select only brokers and dealers in measuring the percentage of scrap sold by Luria.

For example, the Court of Appeals stated the percentage of scrap bought by Bethlehem from Luria as 81.2% in 1953 and 80.9% in 1954, the last two years considered by the Commission. Whereas, as appears from the examiner's figures at R. 2209a, Luria's share of *all* scrap

purchased by Bethlehem in 1953 was only 64% and in 1954, 50.9%.*

Of course, the tonnages bought by the individual mills varied tremendously. For example, the 100% of its scrap bought by *Edgewater* in 1954 amounted to about 12,000 tons (R. 5651a), whereas, the 50.9% bought by *Bethlehem* in the same year amounted to 845,000 tons (R. 5629a).

Although in minute detail the evidence before the examiner covered the history of the relations between Luria and each of its customers, it is unnecessary to discuss these relations here.

The common denominator of these dealings and the one which presents the legal issue in this case is that the dealings between Luria and its customers did not result from any agreement or conspiracy among the buyers, nor was there—except for two or three very temporary exceptions and one very special situation—any obligation on the part of any customer to continue to buy from the supplier, or any economic compulsion on any customer to do so. (The special situation was one in which Luria at the request of Bethlehem Pacific Coast Steel Corporation constructed a scrap yard additional to one of its plants, in consideration of which investment that mill agreed to buy a certain part of its scrap from Luria. The contract expired some years ago.)

And finally, it is frustrating to go deeply into evidence so stale as the evidence in this case.

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*With respect to petitioner United States Steel Corporation, the Court of Appeals stated that the mill bought from Luria in 1953, 89.5% of its purchased scrap and in 1954, 93.9% (App. 10a). In fact, these were the purchases only of *one* relatively small plant of U. S. Steel. The percentage of scrap purchased from Luria by *all* of the U. S. Steel plants was 19.7% in 1953 and 11.8% in 1954 (R. 5659a). One might ask by what logic the Court considered only purchases at *one* plant for the purpose of determining exclusivity, and on the basis of that finding sustained an order *against every single plant of United States Steel throughout the country.*

The period examined by the Commission commenced 23 years ago and ended more than 13 years ago. In 1962, Commissioner Elman in his dissenting opinion said:

> "Moreover, the Commission's order, based as it is upon events of nearly a decade ago, has little relevance to present conditions in the scrap market." (App. 114a)

REASONS FOR GRANTING THE WRIT

The Court of Appeals in this case affirmed an order of of the Federal Trade Commission which we submit is unparalleled in judicial history, is unauthorized even under the spreading oak of vagueness of the Federal Trade Commission Act, and enunciates a general doctrine so contrary to the spirit of free enterprise that it demands reconsideration by the Supreme Court.

That order forbids an independent supplier (Luria) from selling to any of certain named buyers (the petitioning mills) and any other possible customer—no matter how small—"all or substantially all" of its requirements of a readily available commodity (iron and steel scrap), even though there is no agreement or conspiracy among the buyers to buy from the supplier, nor any agreement or conspiracy between the supplier and *any* buyer to continue buying, nor any obligation or any economic compulsion on any buyer to do so.

Admittedly, if satisfied buyers continue to purchase from a single seller, the result may be that the seller will have a large percentage of the business—and perhaps all of it. *Luria submits that far from being unlawful, this is pure competition.* As Commissioner Elman pointed out in his vigorous dissent:

> "The so-called exclusive supply arrangements neither restrained the mills' freedom to buy from other suppliers nor foreclosed Luria's rival suppliers from the opportunity to sell to the mills." (App. 109a)

The Court of Appeals held that to allow satisfied buyers acting independently of each other to continue purchasing from one seller, although motivated by sound business judgment in response to different circumstances, "would open a large loophole in our antitrust laws" (App. 22a). *It is submitted that this startling pronouncement is utterly inconsistent with the fundamental policy of the antitrust laws and requires review by this Court.*

Luria does not contest the fact that the mills bought large amounts of scrap from Luria. Apparently, the Federal Trade Commission and the Court of Appeals took this as evidence that Luria is a monopoly or that it intends to monopolize. Neither is the case.

Monopoly means the power to fix prices or to exclude competition. *U. S.* v. *E. I. duPont de Nemours & Co.*, 351 U. S. 377, 389 (1956). *Price fixing was neither charged nor proven.*

As to the power to exclude competitors, the Federal Trade Commission, the examiner, and the Court of Appeals all conceded that *each mill has complete and unrestricted freedom at all times to buy from whomever it pleases.* The wide variation in the percentages purchased from Luria by the mills both on a company-wide basis and among the plants of a single company shows that each mill exercised its freedom.

Indeed, as Commissioner Elman observes, under the Commission's order the mills may now buy all their scrap from a single broker *other* than Luria, and that broker

would then have the business and Luria would not (App. 114a).

Consequently, where is the illegality? Commissioner Elman outlined his difficulties with the majority opinion which he felt "may also be encountered by others, including a reviewing court" (App. 107a). Unable to determine just what theory was used by the majority and the examiner, Commissioner Elman reviewed four possible theories of illegality *and found that the evidence supported none of them.*

A précis of the proceedings adds irrefutable support to this conclusion.

The Commission charged in its complaint that there was a conspiracy among the mills and Luria to make Luria a monopolist in the scrap industry. The Commission further charged that Luria alone and in conjunction with the mills engaged in a host of unfair practices incidental to, and in furtherance of the alleged conspiracy. At the close of the evidence offered by complaint counsel, the examiner dismissed the charge of conspiracy. In addition, the examiner dismissed every single charge of unfair practices. The Commissioner affirmed on both points. The Court of Appeals took note of these dismissals (App. 4a).

Obviously, if these accusations could have been proven, there would have been classic violations of the antitrust laws and the Federal Trade Commission Act.

However, the dismissal of the conspiracy and unfair practice charges stripped the dealings between Luria and its customers of any semblance of illegality. Complaint counsel clearly recognized this when he warned the Federal Trade Commission on oral argument that unless the Commission reversed the examiner on the unfair practice charges, *the Commission would lose the case in the courts* (R. 2680a).

As the Commission noted (App. 55a), the examiner's theory of the illegality was not "crystal-clear." He found that as between Luria and each individual mill, there was an "agreement" for continued supply although he was quick to add:

> "They do not, obviously, have a number of basic features of a normal long-term supply contract, such as a stated term, a specification of the type of scrap involved, specific prices or a price formula provision, terms of payment, etc. *The only binding contracts are the individual orders, after acceptance by Luria,* and the terms of these may vary from order to order." (Emphasis supplied) (R. 2625a)

The examiner further found that the "agreements"

> ". . . were entered into by each of the mills at different times and for different reasons, and were based on economic conditions prevailing in their own areas and individual needs of the particular mills involved." (R. 2389a)

Conceding that the "agreements" did not violate Section 3 of the Clayton Act, the examiner found them an "economic equivalent" to the type of agreement covered by that section. Therefore, he reasoned, the "agreements" violated Section 5 of the Federal Trade Commission Act (R. 2643a).

The FTC majority rejected the examiner's reasoning, but nevertheless seemed to conclude that there were "exclusive agreements", and hence they were unlawful. Commissioner Elman astutely observed that the majority simultaneously rejected and accepted the examiner's Section 3 theory (R. 2757a).

The Commission also spoke of an attempt to monopolize on behalf of Luria. But since the only "evidence" cited was the alleged exclusive agreements, the essential question is still whether completely voluntary arms-length dealing between Luria and its customers is unlawful simply because of the magnitude of the purchases.

The FTC majority underscored the issue by changing the examiner's order so as to prohibit Luria and the mills from dealing exclusively or substantially exclusively even on an order-to-order basis, and *"sans agreement"* as to any future business (See App. 77a). The examiner's order only outlawed such dealings *pursuant to agreement.*

The Court of Appeals affirmed the order in its entirety. Again, the legal theory is vague. Overlooking *"sans agreement"*, the Court cited in support of its position a case in which the essential feature was exactly the opposite—that is, *a definite contractual obligation between the supplier and the customer;* namely, *FTC* v. *Brown Shoe Co.*, 384 U. S. 316 (1965) at 321, in which this Court said:

> "The record in this case shows beyond doubt that Brown, the country's second largest manufacturer of shoes, has a program, which requires shoe retailers, *unless faithless to their contractual obligations* with Brown, substantially to limit their trade with Brown's competitors. This program obviously conflicts with the central policy of § 1 of the Sherman Act and § 3 of the Clayton Act against *contracts which take away freedom of purchasers to buy in an open market."* (Emphasis supplied)

It is because in this case *there are no contractual obligations or any other obligations* whatsoever requiring that Luria and any customer deal with each other that the busi-

ness relations do not infringe what this Court has referred to as "the basic policies of the Sherman and Clayton Acts." *FTC* v. *Brown Shoe Co., loc. cit., supra.*

This point was clearly seen by Commissioner Elman when he said:

> "The arrangements between Luria and the mills were not exclusive in the sense that they tied the mills to a single source of supply. Like a housewife who buys milk for her family regularly and exclusively from a single dairy, *a mill buying scrap from Luria remains free to stop doing so at any time and for any reason.*" (Emphasis supplied) (App. 109a)

It is submitted that the groping for legal theory to sustain the order goes to the heart of the matter.

It reveals the difficulty and injustice of penalizing the successful competitor. Indeed, it is submitted that upon analysis, what the Court of Appeals and the FTC have held is that *bigness resulting from free competition is "unfair" under Section 5 of the Federal Trade Commission Act.* Moreover, every purchaser, no matter how tiny, who buys from a big seller, is also tainted.

For example, petitioner Edgewater's annual purchases from Luria over the ten-year period involved in this case never exceeded .00524 of the scrap purchased in the relevant market (R. 5861-2a).* Nevertheless, the Court of Appeals holds that even this eyedropperful contributes to Luria's size, and therefore, Edgewater has unwittingly committed an unlawful act. On the same logic, *every cus-*

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*Petitioners Bucyrus-Erie, McLouth, and Detroit Steel did not fit into any of the defined marketing areas (App. 16a). Consequently, there is no way to test the economic impact of purchases by those mills. Undoubtedly, purchasers smaller than Edgewater will be affected because the order bars Luria from acting as exclusive supplier to *any buyer, anywhere, any time.*

tomer—including every member of this Court—might be enjoined from buying a General Motors automobile.

Modernistic Candies v. *FTC,* 145 F. 2d 454 (7th Cir. 1944), is the sole authority cited by the Court of Appeals in support of this proposition (App. 27a). The citation is askew. In that case, the Seventh Circuit agreed that merchandising by the use of gambling devices is unlawful, and not only gamblers, but manufacturers *"who deliberately and designedly aid and abet them"* may also be enjoined. 144 F. 2d 455 (Emphasis supplied).

To equate the manufacturer of gambling devices who *intentionally aids and abets a per se unlawful activity,* with the customer who chooses to buy from the best supplier, is to equate the guilty with the innocent.

Only on the ground of conspiracy among the steel mills would the Court of Appeals have been justified in adding up the innocent purchases of each mill and finding illegality. Though the conspiracy charge was dismissed, its ghost haunts the background and supplies *sub silentio* the theoretical underpinning of the decision.*

Petitioner submits that the importance of the issue in this case is difficult to over-emphasize. Paraphrasing the question presented for review, the issue is whether the likelihood that orders will be given and accepted in the future if relations prove satisfactory, is a course of conduct which henceforth will be unlawful if the seller thereby does a large volume of business.

Luria's relations with its individual customers constituted nothing but the measure of the customers' good will to Luria; namely, a "reasonable expectation that 'the old customers will resort to the old places' ", *Commissioner* v. *Killian,* 314 F. 2d 852, 855 (5th Cir. 1963), and hence, a

*If, for example, the FTC brought this proceeding solely against Edgewater, it is inconceivable that any order would be sustained.

reasonable expectation of what Mr. Justice Brennan in *N. L. R. B.* v. *Brown,* 380 U. S. 278, 284 (1965), called "repetitive patronage."

These words describe exactly the relationship between Luria and its customers and present to this Court for the first time the question whether the likelihood of such patronage constitutes what the Commission and the Court of Appeals have called *not quite* a contract or agreement, but an "arrangement," which *constitutes unfair competition* and violates the Federal Trade Commission Act.

We respectfully submit that if this question is answered in the affirmative and it is held that it is an unfair trade practice for a seller to build up a good will consisting of the hope and realization of repetitive patronage, there is a handcuff put on the ambitions of a competitive businessman which it never was the purpose of the Federal Trade Commission Act to impose.

We respectfully submit that in no other case has the relationship between a seller and a satisfied customer *who is entirely free to take his trade elsewhere at any time for any reason,* been considered an unfair trade practice because the seller has *other* satisfied customers.

CONCLUSION

For the reasons presented, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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